

UNITED STATES  
v.  
ANTON M. OZANICH, JR., AND JO ANN M. OZANICH

IBLA 71-9

Decided August 29, 1972

Appeal from decision by hearing examiner in Contest S-2598, declaring mining claims null and void.

Affirmed.

Mining Claims: Contests -- Mining Claims: Discovery: Generally

A claimant must show his mining claim is valuable for minerals at the time of a contest against the claim. Evidence of sales of minerals three decades ago does not establish the present existence of a discovery.

Mining Claims: Discovery: Generally

Evidence of mineralization, which is only sufficient to warrant further exploration, does not establish a discovery of a valuable mineral deposit within the ambit of the United States mining laws.

APPEARANCES: Lawrence N. Baker, Esq., of Vizzard, Baker, Sullivan, McFarland & Long, attorneys-at-law, for the appellants; Charles F. Lawrence, Office of the General Counsel, Department of Agriculture, for the United States.

OPINION BY MR. FISHMAN

Anton M. Ozanich, Jr., and Jo Ann M. Ozanich have appealed from a decision, dated July 24, 1970, rendered by hearing examiner Graydon Holt, holding certain mining claims null and void for lack of a discovery of valuable minerals. The appeal is directed only to the Black Mountain King Lode, and the Black Mountain King #2, #3, and #4 Lodes.

The two grounds of appeal are: (1) the "prudent man" test does not require that a mining claimant "shall show a paying mine at the time of location" and the contestees' showing that further exploration is justified warrants a finding that a discovery has been made; and (2) the samples, introduced by the contestees, "\* \* \*" which showed a range of tungsten content from 0.16% to 0.74% are sufficient with the present price of tungsten to warrant a man of ordinary prudence in the further expenditure of his labor and means with a reasonable prospect of success to develop a valuable mine on the claim."

The facts of the case are set forth in the decision below, a copy of which is attached. We proceed to consider the first ground of appeal.

It is clear that a contestee must show that his claim is valuable for minerals at the time of the contest and not as of some time in the past. Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1962); Mulkern v. Hammitt, 326 F.2d (9th Cir. 1964); Adams v. United States, 318 F.2d 861 (9th Cir. 1963). Therefore, the evidence of sales of tautite during World War II, although probative of the mineral character of the land at that time, does not establish the present existence of a discovery. It seems clear that a mining claim only worthy of further exploration to determine the extent of the ore body, is not a claim on which a discovery has been made. United States v. Charles W. Kohl and Cora A. Kohl, 5 IBLA 298 (1972). This concept finds support in Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. den., 393 U.S. 1025 (1969), which cited with approval the Department's view on the subject; i.e., that while a valuable mine need not be shown to be a profitable one, nevertheless, the nucleus of value which sustains a discovery must be such that with actual mining operations, under proper management, a profitable venture may reasonably be expected to result. Cf. United States v. Howard S. McKenzie, 4 IBLA 97 (1971). We therefore adhere to the view that the mere fact that exploration is warranted to determine the extent of an ore body does not endow a mining claim with a discovery of valuable minerals. United States v. New Mexico Mines, Inc., 3 IBLA 101 (1971).

The contestant introduced sufficient evidence to establish a prima facie showing that there is not a valuable mineral deposit on the claims. The testimony on behalf of the contestees with respect to the extent of the ore body goes no further than to suggest (Tr. 51-53) that further exploration work is warranted. This testimony does not rebut the contestant's showing.

With respect to the second ground of appeal, there is nothing in the record to impel the conclusion that tungsten values of 0.16% to 0.74% are subject to economic beneficiation. The contestees' witness who took the samples and had them assayed in the laboratory of a company of which he is vice-president (Tr. 49) agreed with the contestant's witness that this prospect "is worthy of more exploration work." (Tr. 53).

As pointed out in Best v. Humboldt Placer Mining Co., supra, a discovery "must be of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a paying mine." The contestees have not met their burden of proof.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed.

Frederick Fishman  
Member

We concur:

Martin Ritvo  
Member

Joan B. Thompson  
Member

July 24, 1970

DECISION

United States of America,	:	<u>Contest No. S! 2598</u>
Contestant	:	
	:	
v.	:	Involving Black Mountain King
	:	Lode, Black Mt. King #2, #3, #4
	:	Lode, Black Mountain King #5, #6,
Anton M. Ozanich, Jr., and	:	#7, #8, #9, and #10 Lode, and
JoAnn M. Ozanich,	:	Black Mountain Queen #1, #2, #3,
Contestees	:	and #4 Lode mining claims,
	:	located in Sec. 27, T. 25 S.,
	:	R. 32 E., M.D.M., Kern County,
	:	California

Mining Claims Declared Null and Void

This proceeding was initiated by the Bureau of Land Management on behalf of the United States Forest Service through a complaint which was filed in the Land Office of Sacramento, California, on June 25, 1969. In the complaint the contestant alleged:

- a. There are not disclosed within the boundaries of the claims, minerals of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute a discovery.
- b. The lands embraced within the claims are nonmineral in character.

The contestees filed a timely answer in which these allegations were denied.

Thereafter, a hearing was held in Bakersfield, California, on May 19, 1970, to afford the parties an opportunity to present evidence and to examine and cross-examine witnesses. Charles F. Lawrence, Esq., Office of the General Counsel, U.S. Department of Agriculture, San Francisco, California, appeared on behalf of the contestant. Lawrence M. Baker, Esq., Bakersfield, California, appeared on behalf of the contestees. The witnesses were Mr. Wesley G. Moulton, a mining engineer employed by the Forest Service; Mrs. Lena E. Huckabay, a former owner of the Black Mountain King Lode claims; Mr. Anton M. Ozanich, Jr., a contestee; and Mr. Otto Hackel, a geologist.

The Black Mountain King Lode, Black Mt. King Nos. 2, 3, and 4 were located by Sam Huckabay in 1940. All the other claims were located by the contestees in 1963. The mineral sought on each of the claims is tungsten. They are in the Sequoia National Forest northeast of Bakersfield and on the west slope of the Sierra Nevada Range. The improvements consist of a cabin on Black Mt. King No. 5, a tunnel and pit on the Black Mountain King Lode, and an access road leading to the cabin and the tunnel.

Within Black Mountain King there is a deposit of tactite. Tactite is a rock of more or less complex mineralogy formed by the contact metamorphism of limestone, dolomite or other calcareous rocks into which foreign matter from the intruding magma has been introduced by hot solutions. <sup>1/</sup> In many places within California tactite is the host rock for scheelite, a tungsten ore. The deposit is approximately 100 feet long, 50 feet wide, at least 60 feet deep and is exposed in both the tunnel and the pit. During the Second World War an unknown quantity of tactite was mined by Mr. Huckabay from the tunnel and pit. The contestees had two receipts issued to Mr. Huckabay in the total amount of \$1920 for tungsten concentrates secured from the claims. The receipts are dated February 12, 1943, and July 10, 1945 (Exhibits B and C).

Mr. Moulton examined the group of claims on a number of occasions during June 1968. On one occasion he was accompanied by Mr. Ozanich, the contestee. During the course of his examination he took samples of the tactite from both the pit and the tunnel. He had the samples assayed and the results showed negligible values in tungsten and either a trace or none in gold and silver (Exh. 22). One sample was given a spectrographic analysis to determine if there were any other potential minerals in the material. The analysis showed there were no other minerals in sufficient quantity to be valuable (Exh. 23). From his examination and the assay reports, Mr. Moulton concluded that there was insufficient mineralization to justify the expenditure of time and means on the claims with a reasonable prospect of success in developing a paying mine.

Mrs. Huckabay testified that her husband is now deceased, and that he mined tactite from the Black Mountain King claim during the Second World War. She did not know how much material he removed or what he received for it.

Mr. Ozanich testified that he bought the four Black Mt. King claims from Mr. Huckabay in 1963 and located the remaining mining claims at approximately the same time. The only claim in the group that has been worked is the Black Mountain King. During the period of his ownership he has cleaned the pit out several times and has extended the tunnel. He has

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<sup>1/</sup> Glossary of The Mining and Mineral Industry, Bulletin 95, U.S.B.M.

not mined or sold any ore from any of the claims. He has sold several hundred dollars worth of rock to "rock hounds," and has allowed members of the public to enter the claims in search of attractive rocks for \$1 a day. His total income from rock sales and rental charges between 1965 and 1969 has been \$518.50. Mr. Ozanich testified that he is not in a financial position to start producing, and that he is working the mine as fast as he can during the summers and weekends.

Mr. Hackel was on the group of claims several weeks before the hearing. He examined the pit and tunnel and used an ultra-violet lamp on the tactite. He described such a lamp as a useful tool in determining whether there are any florescent minerals present. Also he secured five samples and had them assayed for tungsten and molybdenum. The results in tungsten ranged from 0.16% to 0.74%. Two samples contained 0.01% molybdenum and three contained none. Mr. Hackel testified that there has not been sufficient exploration to determine whether the size or grade of the tactite deposit is sufficient to justify a mining operation. He believes that the deposit should be drilled to determine its depth, and concluded that the deposit was a good prospect which should be explored further.

The validity of a mining claim is dependent on the discovery of a valuable mineral deposit. For a lode claim there must be a lode or vein bearing a sufficient quality and quantity of minerals to warrant a prudent man in the expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. Castle v. Womble, 19 L.D. 455 (1894); United States v. Coleman, 390 U.S. 599 (1968).

The contestant presented a prima facie case that there is not a valuable mineral deposit on the claims through the testimony of an expert witness. The contestees refuted a portion of this testimony by an expert witness who found sufficient mineralization on one claim to justify further exploration. The contestees contend that this is sufficient to satisfy the mining law. A similar contention was considered in United States v. Warren E. Wurts and James E. Harman, 76 I.D. 6 (1969). Here it was held:

In a long line of decisions, the Department has distinguished between the evidence of mineralization which will justify further exploration for mineral deposits which are valuable for mining purposes and that evidence which will warrant a man of ordinary prudence in the further expenditure of his labor and means, with a reasonable prospect of success, in attempting to develop a valuable mine on a claim, and it has held that only the latter constitutes a discovery. See e.g., United States v. Clyde R. Altman and Charles M. Russell, 68 I.D. 235 (1961); United States v. Edgecumbe Exploration Company, Inc., A-29908 (May 25, 1964); United States v. Kenneth O. Watkins and Harold E. L. Barton, A-30659 (October 19, 1967).

The validity of this distinction has now been expressly recognized in Converse v. Udall, 399 F. 2d 616 (9th Cir. 1968).

The mineral value which demonstrates a discovery must be \* \* \* a present mineral value. That is, the mineralization presently exposed on a claim must be sufficient to meet the test of a discovery. If it is not, the fact that minerals of sufficient quality and in sufficient quantity to justify mining operation may once have been found upon the claim, that the claim may have been successfully mined at some time in the past, or that, at some time in the future, increased mineral prices or improved technology may make profitable mining operations possible where they cannot now be contemplated, cannot compensate for present deficiencies in the showing of mineral values. See Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1963); Adams v. United States, 318 F. 2d 861 (9th Cir. 1963); Mulkern v. Hammitt, 326 F.2d 896 (9th Cir. 1964); United States v. R. W. Wingfield, A-30642 (February 17, 1967); United States v. Taylor T. Hicks et al., A-30780 (October 24, 1967); United States v. Evelyn M. Kiggins et al., A-30827 (July 12, 1968); United States v. W. S. Pekovich, A-30868 (September 27, 1968).

Since the contestees went no farther than to establish that further exploration, rather than development, would be justified, it must be found that the deposit of tactite on the Black Mountain King claim is not sufficiently valuable to constitute a discovery of a valuable mineral deposit. Accordingly, the Black Mountain King Lode; Black Mt. King #2, #3, #4 Lode; Black Mountain King #5, #6, #7, #8, #9, #10 Lode; and Black Mountain Queen #1, #2, #3, and #4 Lode mining claims are declared null and void for the lack of such a discovery.

The right of appeal to the Board of Land Appeals, Office of the Secretary, is allowed in accordance with the regulations in 43 CFR Part 1840, 35 F.R. 10010 (June 18, 1970). However, if an appeal is to be taken, the notice of appeal must be filed in this office (not the Board) so that the case file can be transmitted to the Board. To avoid summary dismissal of the appeal, there must be strict compliance with the regulations.

Graydon E. Holt  
Hearing Examiner

